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No. 10-884

Supreme Court, U.S.
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In The

Supreme Court of the United States

SAMUEL SCOTT,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Whether the Texas harassment statute is unconstitutionally void for vagueness and overbroad.

2. Whether the Texas harassment statute violates the First Amendment because it is a content-based restriction on speech and expressive conduct.

3. Whether private argumentative speech should be a protected class of speech.

4. Whether the First Amendment requires an analysis of the distinctions between open-air, face-to-face communication and electronic communication.

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OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is reported at *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010). The opinion of the Court of Appeals of Texas, Fourth District, at San Antonio is reported at *Scott v. State*, 298 S.W.3d 264 (Tex. App. – San Antonio 2009).

JURISDICTION

The date on which the highest state court decided Petitioner's case was October 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATEMENT

The Petitioner now responds to the following arguments presented by the Respondent:

1. That the Petitioner has not properly preserved the second, third, and fourth questions presented.

2. That First Amendment jurisprudence controlling this case is not unsettled.

3. That similar harassment statutes have been affirmed.

4. That the Texas harassment statute is not vague and it does not implicate the First Amendment.

5. That this is not an "electronic communications" harassment case.

ARGUMENT

I. Petitioner Has Properly Preserved The Second, Third, And Fourth Questions Presented.

Respondent contends that Petitioner failed to properly invoke this Court's jurisdiction as required by 28 U.S.C. §1257(a) concerning the second, third, and fourth questions presented. (Res.Br. 7-8). This argument ignores the substance of the arguments in the prior filings of Petitioner and the prior proceedings in the Texas Courts and looks instead to the formality of labeling a particular argument a "question presented" as the only means to show that it " . . . was either addressed by, or properly presented to, the state court that rendered the decision. . . ." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). This understanding of 28 U.S.C. §1257(a) is not supported by this Court's rulings. *See id.* (setting out different formulations of the requirements necessary to preserve a federal claim). Moreover, "[a] litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

In regard to the second question presented, Petitioner has clearly raised this issue. While the specific statement used in the second question presented has not been previously listed in Petitioner's prior filings as a "question presented," it has clearly been germane to the underlying proceedings and can be found thoroughly briefed and set out in boldface type in the headings of both Petitioner's appeal to the Court of Appeals, Fourth District, at San Antonio and in Petitioner's brief in response to Respondent's Petition for discretionary review to the Texas Court of Criminal Appeals. *See* (Pet.Br.App. 135). This argument is inextricably intertwined with the first question presented because a major issue throughout this case is whether the Texas harassment statute implicates the First Amendment thus allowing Petitioner to make a facial challenge for vagueness and overbreadth. One way of showing that the statute involves speech is by arguing that it regulates the content of speech as Petitioner has consistently done. This issue was also addressed by the lower court's opinion. *See Scott v. State*, 322 S.W.3d 662, 669 (Tex. Crim. App. 2010).

In regard to the third and fourth questions presented, these formulations have grown out of the prior proceedings and, in many ways, are reactionary to the erroneous ruling of the Texas Court of Criminal Appeals. The issue of private argumentative speech is a creative formulation of what has been ultimately at issue within the vagueness and overbreadth challenge. It refers to expression that by nature is

confrontational and thus annoying or harassing at times, but is nonetheless vital communication that is at the heart of the protections provided by the First Amendment. This is a label for a region of speech that Petitioner contends is beyond the legitimate sweep of the Texas harassment statute but nevertheless is included as conduct prohibited by the statute. This has clearly been an issue in this case because both the Respondent and the Texas Court of Criminal Appeals have previously argued and ruled that communication made with the specific intent to annoy, harass, alarm, etc. is not speech, let alone protected speech.

Finally, the issue of whether the First Amendment requires analysis of the distinctions between open-air, face-to-face communication and electronic communication is in essence a response to the Texas Court of Criminal Appeals ruling in this case as compared to its own prior ruling in *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996). As previously argued, the most significant distinction between the prior overruled Texas statute in *Long* and the one before this Court, is that the latter deals only with different forms of electronic communications, be it by telephone or some other electronic device, as compared to communication between people in their immediate presence. It is a question presented to this Court because Petitioner believes that this is a significant issue at hand concerning the larger issue of First Amendment jurisprudence within the context of rapidly changing communication technology. This

argument has essentially been brought throughout the proceedings by citing *Long* for the proposition that the current statute at issue should be overruled for the same reasons as the statute in that case.

Alternatively, there is no contention by Respondent that the first question presented for review by Petitioner was not preserved. The latter three questions presented are cognizable by this Court as subsidiary arguments that are fairly included in support of the first. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee*, 503 U.S. at 534 (1992). For the same reasons that Petitioner contends that these issues have been properly presented, they are also clearly related and supportive arguments to Petitioner's first question presented. Should the court decide that these issues were not clearly presented and thus not ripe for review as individual questions presented, Petitioner asserts that the issues listed under REASONS FOR GRANTING REVIEW in his Petition for Writ of Certiorari are all supportive arguments in favor of Petitioner's first question presented as well. *See* (Pet.Br. 4-30).

II. First Amendment Jurisprudence Controlling This Case Is Unsettled.

The Respondent disagrees with the assertion that the law concerning speech transmitted *via* telephone or wire is unsettled, yet, through the words

of their own argument, they bring before the Court the very reasons why clarity in this area is so desperately needed. (Res.Br. 12). Without question this Court has discussed at length the important interaction between the concepts of vagueness and overbreadth. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000) (stating that a statute is impermissibly void if it proves unreasonably difficult for a person of ordinary intelligence to understand what conduct the statute prohibits or "if it authorizes or even encourages arbitrary and discriminatory enforcement" (citing *Chicago v. Morales*, 527 U.S. 41, 56-57 (1999))); *United States v. Williams*, 553 U.S. 285, 304 (2008) (discussing the "relaxed" requirements applied by the Court to overly-broad statutes regulating speech). Nevertheless, the careful foundation created to guarantee the protections of the First Amendment requires careful scrutiny to meet the needs of a society constantly developing new methods of expression. *See Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 777-778 (1996) (acknowledging the ever-changing world of communications as an important factor in interpreting the First Amendment); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698 (1992) ("We have allowed flexibility in our doctrine to meet changing technologies in other areas of constitutional interpretation.") (O'Connor, J., concurring) (citations omitted).

A. Vagueness

The truly unsettled issue, in terms of vagueness, boils down to a crisis of categorization. For example, faced with a telephone harassment law similar to Texas' §42.07, the Supreme Court of Oregon concluded that the contested statutory language failed to adequately define the extent and the type of conduct it sought to prohibit. *State v. Blair*, 601 P.2d 766, 769, 287 Or. 519, 524-525 (1979). The statute targeted the *communication* rather than the specific injury inflicted upon the victim in any given case. *Id.* at 768. In another example, while addressing a disorderly conduct statute focused upon analogous speech-based harassment, the Wisconsin Supreme Court stressed that their decision to uphold the statute over a vagueness challenge was predicated upon the efficacy of the law in providing notice to the defendant that certain types of *conduct* rather than speech were prohibited. *See State v. Schwebke*, 644 N.W.2d 666, 680, 253 Wis. 2d 1, 29 (Wis. 2002). The Texas harassment statute, in contrast, does not provide any form of dependable conduct-based notice. *United States v. Williams*, 553 U.S. 285, 306 (2008) (explaining that vague statutes fail by virtue of the "indeterminacy" of what facts the state must prove; rejecting "conduct [that] was 'annoying' or 'indecent' as wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings" (citing *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971))); (Pet.Br. 13). The Respondent attempts to under emphasize just how vague the Texas statute truly is.

Instead of regulating merely telephone calls, Section 42.07 targets any kind of electronically expressed communication. Tex. Penal Code §42.07. To suggest that the law is settled concerning criminal provisions where conduct must, by virtue of the statutory wording, be interpreted on a case-by-case basis is to enter the realm of physical impossibility. *See generally Aptheker v. Sec'y of State*, 378 U.S. 500, 516 (1964) (disfavoring a case-by-case approach in efforts to "probe" a statute for an inkling of constitutionality); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 33 (1963) ("This is not to say that a beadsight indictment can correct a blunderbuss statute, for the latter itself must be sufficiently focused to forewarn of both its reach and coverage."); *Blair*, 601 P.2d at 768 (concerned with the potential for vague laws to allow a jury to determine what conduct the law was intended to proscribe).

B. Overbreadth

This Court has long recognized the dangers engrained in overly-broad laws which extend well past their intended scope. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (prioritizing the more compelling interest of preventing the chilling of legitimate speech at the hands of an overly-broad statute); *New York v. Ferber*, 548 U.S. 747, 768 (1982) (stating that citizens might "refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression"). The Court has phrased this argument in terms of a

"relaxed" vagueness challenge, allowing a defendant to assert that a statute is facially invalid in its scope regardless of the conduct specifically charged. *Williams,* 533 U.S. at 304.

The Respondent contends that the questions presented to the Court in this case require a degree of imaginative speculation failing to rise to the level of substantial overbreadth. (Res.Br. 15-16). To apply the Respondent's argument to the types of violations addressed in the Petitioner's petition would be to vitiate the very essence of the overbreadth challenge. No other conceivable method exists to test such a statute than by testing its plain wording against varied forms of protected speech. The Utah Court of Appeals recognized this fact when scrutinizing a telephone harassment law similar in many respects to §42.07. *Provo City v. Whatcott*, 1 P.3d 1113, 1115-1116 (Ut. 2000). That court considered many different legitimate hypothetical situations from the frequent phone calls of a worried mother to a lewd practical joke. *Id.* ("The potential overbreadth of the statute is not, of course, limited to the scenarios posed above."); *see also State v. Dronso*, 279 N.W.2d 710, 117 (Wis. 1979) (taking into consideration the possibility of legitimate needs to make annoying calls). Ultimately, the Utah Court of Appeals held the statute invalid. *Id.* at 1116. The Supreme Court of New Hampshire also relied upon possible applications of the statute in its decision to strike down New Hampshire's own harassment law. *See State v. Brobst*, 857 A.2d 1253, 1256 (N.H. 2004) (citing *People v. Klick*, 362 N.E.2d

329, 330 (Ill. 1977) (finding that the prohibition of all calls made with an intent to alarm jeopardized too many forms of protected speech)). Inquiries of this nature do not constitute "hypertechnical theories," but merely examine whether a statute is valid in the "vast majority" of cases. *Hill v. Colorado*, 530 U.S. 703, 733 (2000); (Res.Br. 16). When §42.07 receives this same degree of scrutiny, it becomes clear that the Texas statute is more than a mere barrier to "the use of the telephone as a weapon by a harasser"; it has the power to discourage many legitimate uses of communication entirely. (Res.Br. 19).

The Respondent attempts to minimize the scope of the Texas harassment statute by asking this Court to only consider the law in the light of its "real life" applications. (Res.Br. 17). Unfortunately, jurors and judges alike do not possess a dowsing rod to assist them in determining exactly what conduct constitutes a "real life" scenario envisioned by the statute. *See generally Kramer v. Price,* 712 F.2d 174, 178 (5th Cir. 1983) ("By failing to provide reasonably clear guidelines, [the statute] gives officials unbounded discretion to apply the law selectively and subjects the exercise of the right to speech to an unascertainable standard."). This is the purpose of allowing a facial challenge for overbreadth. *United States v. Raines*, 362 U.S. 17, 22-23 (1960) (citing *United States v. Reese*, 92 U.S. 214, 219-220 (1875)). Trusting the State to determine when and how its harassment statute should operate most certainly has the potential to chill legitimate speech. An overbreadth challenge

constitutes "strong medicine," Texas' current law demands nothing less. *Broadrick*, 413 U.S. at 613.

III. The Statute Implicates First Amendment Speech And Does Not Constitute A Solution To The Problems Facing This Area Of The Law.

The Respondent might contend that the prohibition of argumentative speech conducted by electronic means constitutes nothing more than a mere manner and means prohibition; however, it is difficult to conceptualize how one statute prohibiting harassing speech in general is unconstitutional while the one at issue is applied only to different forms of harassing speech *via* electronic expression is not. *See generally Long*, 931 S.W.2d at 288 (discussing the invalid Texas "stalking" statute). The discrepancy in the Texas cases alone, not to mention the complete lack of clarity in courts nationwide, beg the Court for clarification.

Moreover, the Texas Court of Criminal Appeals has virtually rewritten §42.07(a)(4) in its attempt to "narrowly construe" the statute to avoid First Amendment implications. Compare the statute as written:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment or embarrass another, he:
>
> * * *
>
> (4) makes repeated telephone communications . . . in a manner reasonably likely

> to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

Tex. Penal Code §42.07(a)(4), with the formulation by the Texas Court of Criminal Appeals:

> The statutory subsection, by its plain text, is directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in a manner reasonably likely to inflict emotional distress.

Scott, 322 S.W.3d at 669-670. This formulation required more than just a plain text interpretation. The Texas Court of Criminal Appeals has gone as far as to create a narrowing construction of the statute that virtually rewrites it. Certiorari should be granted in this case to clarify this important matter.

IV. The Distinction Between Electronic Communication And Telephone Communication.

The Respondent argues that the Texas Court of Criminal Appeals rightly determined that this case involves only a subsection of the Texas harassment statute dealing with strictly telephone communication. *See* (Res.Br. 9-12). This is an attempt to avoid the many examples of possible First Amendment violations provided by Petitioner to show the overly-broad language of the Texas harassment statute. Not only does this avoidance give more credence to Petitioner's argument, it also calls into question the

vagueness of the term "telephone communication" altogether.

Both the Texas Court of Criminal Appeals and the Respondent reason that because of the private nature of the telephone, the statute at hand does not criminalize protected speech but only regulates against the invasion of one's privacy. *See* (Res.Br. 32-36), *Scott*, 322 S.W.3d at 669-670 (Tex. Crim. App. 2010). This privacy interest is exaggerated and does not override a citizen's right to free speech. The Respondent contends that the only option for a telephone user to avoid unwanted calls is to turn the telephone off. (Res.Br. 35). This argument ignores modern technology and the changing nature of modern communication including the many new features that are found in current cellular and "smart" phones.

Telephones are not simply rotary phones tethered to an electrical cord that are kept exclusively in one's home. Instead, the modern telephone comes in many forms. Telephones today, (whether landline or cellular) have call blocking features, caller ID, and many other privacy features. It is a long way away from the times of the trapped telephone user who must cut themselves off from the world to avoid a call they would not want to hear.

The distinction between telephone and electronic communication has become meaningless. Modern telephones can access the internet, send instant messages, access social networking sites, stream live video and radio, send text messages, access voice

mails stored on remote servers (as in this case where the voice messages were sent to a cell phone). Therefore, the case at hand implicates the "electronic communications" provision of the statute. Thus the Respondent's need to show a distinction as to what provision of the Texas harassment statute Petitioner was charged under not only fails to avoid examples of protected speech the statute potentially criminalizes, it also promotes Petitioner's argument that the statute is vague as there is no longer a distinction between telephone and electronic communication.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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